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NO. 303

In the Supreme Court of the United States

OCTOBER TERM, 1952

CALMAR STEAMSHIP CORPORATION, *Petitioner*

v.

SYDNEY KEITH SCOTT, One of the Lloyds Underwriters, and

EDINBURGH ASSURANCE CO., LTD. et al., Insurance Companies Members of the Institute of London Underwriters, and EXCESS INSURANCE COMPANY LIMITED, OF LONDON, A British Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This petition for certiorari and the petition in *Calmar Steamship Corporation* v. *United States of America*, October Term, 1952, No. 262, in which the Government does not oppose certiorari, arise

out of the same occurrence. Although the cases were not consolidated, they were tried together and decided in a single opinion by the District Court. 103 F. Supp. 243, R. 700-756. The District Court directed that the appeals proceed on a single printed record. The Court of Appeals decided the appeals in a single opinion (R. 792-804) reported at 197 F. 2d 795.

The United States is financially interested in the outcome since, even in petitioner's view, the liabilities of the war risk insurance underwriters (respondents herein) for the loss of the Portmar in Darwin Harbor, Australia, in February 1942, on the one hand, and of the United States as charterer under the voyage charter (respondent in No. 262), on the other, are essentially in the alternative (Pet. 2). In addition, the Government paid for the insurance (R. 35, 744), and one of petitioner's claims against the Government is for failure to insure (R. 15-16). Therefore, in spite of the fact that it was not a party, the United States is concerned in having as complete and consistent a disposition of the litigation as jurisdictional limitations will permit.

The petition presents the important question of how to harmonize and give effect to all the language of standard war risk insurance coverage provisions (cf. *Standard Oil Co.* v. *United States*, 340 U.S. 54) with respect to war risks likely to be accompanied by frustration of voyage by gov-

ernmental restraints upon American vessels. The court below, reversing the District Court, held that the war risk insurance policies (although they covered risks of war, the consequences of hostilities or warlike operations, and losses caused by gunfire, bombs, or other implements of war) nevertheless were not in force and did not cover losses actually sustained from war risks after the voyage was frustrated by military control.[1] Whether war risk insurance policies should be construed to survive frustration; whether the policies are made nugatory (cf. *Rickards* v. *Forestal Land etc., Co., Ltd.* [1942] A. C. 50, 88) by the Court of Appeals' construction, as petitioner contends; or whether the policies as construed by the court below retain significant areas of insurance coverage and protection, are recurrent questions of maritime law with respect to war risk insurance, of concern to shipowners, underwriters, and the Government, which have not been decided by this Court.

For these reasons, the United States, while not concurring in the petitioner's reasoning, nor joining in all the arguments it advances, nor conceding that the Government automatically becomes liable in the event that the insurance underwriters

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[1] It said (197 F. 2d at 801):

> "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer."

are not, agrees that the petition raises important questions of federal law appropriate for decision by this Court.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General

SEPTEMBER 1952.

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> authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention. [R. 50-51, 70, 714-15.]

In addition, the policies stated that the vessel would be (Rider F-300, R. 70, 714):

> Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required.

that

> The premium paid for this insurance shall not be subject to any return for layups or otherwise.

and that (R. 70, 712-713):

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

> In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

Petitioner took out this insurance (R. 709) paying the 1½% premium stipulated by respondents and advising the United States before the vessel's departure of the kind and amount of insurance procured (R. 598-601).

The *Portmar* left San Francisco on November 28, 1941, bound for Manila with a cargo of high octane gasoline and sundry other military supplies (R. 716). On December 7, 1941, while proceeding, in accordance with routing orders issued by the United States Naval Control Officer at San Francisco, 600 miles southeast of the Hawaiian Islands, she received a radio report of the Japanese attack on Pearl Harbor (R. 715-16). In order to avert serious danger of enemy attack, the master, a veteran of over thirty years experience, changed his course and proceeded south pending further naval orders (R. 273, 717). On December 11, radio instructions were received from the Naval Commandant at San Francisco to proceed to Suva, Fiji Islands, to obtain further directions from British naval authorities (R. 717). The *Portmar* was then 600 miles south of the route prescribed in her original orders. On arrival at Suva on December 20, she was directed to proceed to Sydney, Australia, by the British Naval Control Officer in the presence